



THE ATTORNEY GENERAL  
OF TEXAS

JIM MATTOX  
ATTORNEY GENERAL

November 12, 1990

Mr. William W. Hunt  
Assistant Attorney General  
Consumer Protection Division  
Supreme Court Building  
Austin, Texas 78711-2548

OR90-537

Dear Mr. Hunt:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 10011.

You have received a request under the Open Records Act for all correspondence between the Office of the Attorney General and FundAmerica, Inc., of Irvine, California. You assert that the information requested is excepted from required public disclosure by sections 3(a)(1), 3(a)(3), and 3(a)(10) of the act.

Specifically, you assert that section 3(a)(1), coupled with section 17.61 of the Business and Commerce Code, render much of the requested information excepted from disclosure. Section 3(a)(1) of the Open Records Act protects from required public disclosure:

information deemed confidential by law,  
either Constitutional, statutory, or by  
judicial decision.

The statute upon which you rely is section 17.61 of the Business and Commerce Code, which authorizes the consumer protection division of the Office of Attorney General to execute a civil investigative demand for documentary material relevant to the subject matter of an investigation conducted by that division.<sup>1</sup>

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1. Chapter 17 of the Business and Commerce Code is the  
(Footnote Continued)

Subsection (f) of section 17.61 of the code provides:

No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the consumer protection division without the consent of the person who produced the material. The consumer protection division shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or any duly authorized representative of that person. The consumer protection division may use the documentary material or copies of it as it determines necessary in the enforcement of this subchapter, including presentation before any court. Any material which contains trade secrets shall not be presented except with the approval of the court in which the action is pending after adequate notice to the person furnishing the material. (Emphasis added.)

You do not indicate that the person from whom you obtained the requested information has consented to its release. We assume, therefore, that he has not. We conclude that any information in your custody that you obtained pursuant to a civil investigative demand is excepted from required public disclosure.

Additionally, you contend that much of the information that you have obtained from FundAmerica, Inc., contains trade secrets or commercial or financial information that is excepted from disclosure under section 3(a)(10) of the Open Records Act. Section 3(a)(10) excepts from disclosure:

trade secrets and commercial or financial  
information obtained from a person and

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(Footnote Continued)

codification of the Texas Consumer Protection and Deceptive Trade Practices Act.

privileged or confidential by statute or judicial decision.

You have included samples of the information that you have obtained. However, you have not made any argument in support of your assertion that section 3(a)(10) applies to the sample information. Nor has FundAmerica, Inc., made any such argument pursuant to subsection (c) of section 7 of the Open Records Act.

This office consistently has held that the mere assertion, without more, that a provision of section 3 of the act excepts requested information from required public disclosure does not comply with the procedural requirements of the act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 252 (1980). The governmental body should indicate which exceptions it believes apply to specific portions of the information and explain why those exceptions apply. If a governmental body fails to do so, the exception ordinarily is waived. Attorney General Opinion JM-672 (1987). Because you have not explained why section 3(a)(10) excepts specific items of information, we hold that that exception is waived.

Finally, you contend that section 3(a)(3) of the Open Records Act excepts from required public disclosure all of the requested information. Section 3(a)(3) of the act provides:

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence or his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

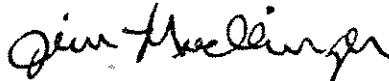
In order that a governmental body may claim section 3(a)(3), the governmental body must show: (1) that litigation is actually pending or reasonably anticipated, and (2) that the information in question "relates" to the litigation. Open Records Decision Nos. 551 (1990); 416 (1984). We are satisfied that litigation is reasonably anticipated or, in the alternative, that settlement negotiations are in progress. This does not, however, resolve your request. This office has held that information in the custody of one

party to litigation that is already available to the opposing party in litigation is not excepted from disclosure under section 3(a)(3). See Open Records Decision Nos. 511 (1988); 349 (1982). In this instance, the information sought is information about FundAmerica, Inc., that you, as a party to the anticipated litigation possess. Therefore, section 3(a)(3) does not act to except the information.

We have considered the exceptions you claimed, specifically sections 3(a)(1), 3(a)(3), and 3(a)(10) and have reviewed the documents at issue. A previous determination of this office, Attorney General Opinion JM-672 (1987), a copy of which is enclosed, resolves your request. For this reason, you may not withhold the requested information except for the information that you received pursuant to section 17.61 of the Business and Commerce Code.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR90-537.

Yours very truly,



Jim Moellinger  
Assistant Attorney General  
Opinion Committee

JM/le

Ref.: ID# 10011

Enclosure: Attorney General Opinion JM-672 (1987)

cc: Pamela Yip  
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